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No.

IN THE
Supreme Court of the United States

OCTOBER TERM, 1982

EASTSIDE MENTAL HEALTH CENTER, INC.,
Petitioner,

v.

DAVID R. WILLIAMS,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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QUESTION PRESENTED

Whether the Tenth Amendment to the United States Constitution, as construed and applied in *National League of Cities* v. *Usery*, 426 U.S. 833 (1976), prohibits application of the minimum wage and overtime provisions of the Fair Labor Standards Act, 29 U.S.C. §§ 206 and 207, to employees of a nonprofit corporation created solely to provide, and which does provide, community mental health services within a comprehensive and integrated mental health system established and operated by the State of Alabama.

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EASTSIDE MENTAL HEALTH CENTER, INC., *Petitioner*,

v.

DAVID R. WILLIAMS, *Respondent*.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

Petitioner, Eastside Mental Health Center, Inc. ("Eastside"),[1] respectfully prays that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Eleventh Circuit entered on March 5, 1982. Rehearing and rehearing *en banc* were denied by the Court of Appeals on May 13, 1982.

OPINIONS BELOW

The opinion of the court below, reported at 669 F.2d 671 (11th Cir. 1982), is reproduced in the Appendix here-

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[1] Eastside, a non-stock, nonprofit corporation, has neither parent nor subsidiary corporations, although, as explained more fully herein, Eastside is closely affiliated with, and operates under the comprehensive direction and control of, the Jefferson-Blount-St. Clair Mental Health/Mental Retardation Authority, an agency organized by the State of Alabama pursuant to Ala. Code §§ 22-51-1 to -14 (1975). Appendix, 39a-49a.

to, 3a-21a. The order denying rehearing and rehearing *en banc* is reproduced in the Appendix, 1a-2a. The April 10, 1980 "Final Order Granting Summary Judgment" of the United States District Court for the Northern District of Alabama with accompanying Memorandum Opinion, granting summary judgment for petitioner Eastside, and that court's March 24, 1981 Order and accompanying Memorandum Opinion denying respondent Williams' motion for reconsideration, reported together at 509 F. Supp. 579 (N.D. Ala. 1981), are reproduced in the Appendix, 22a-36a.

JURISDICTION

Judgment of the court below was entered on March 5, 1982. Petitioner timely filed a Petition for Rehearing and Suggestion For Rehearing *En Banc*, which the court below denied on May 13, 1982. Appendix, 1a-2a. This Petition for Writ of Certiorari has been filed within ninety days of the May 13, 1982 denial of rehearing and rehearing *en banc*. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Tenth Amendment to the United States Constitution:

> The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

Pertinent portions of the Fair Labor Standards Act, 29 U.S.C. § 206 (1976 & Supp. IV 1980) and § 207 (1976); Alabama Code §§ 22-50-17 (1975), and 22-51-1 to -14 (1975); and the *Standards For Community Mental Health Centers* adopted and utilized by the Alabama De-

partment of Mental Health, are set forth in the Appendix, 37a-55a.

STATEMENT OF THE CASE

The petitioner herein is Eastside Mental Health Center, Inc., a nonprofit, tax-exempt Alabama corporation created in 1975 to continue the provision of community mental health services on a local basis within the mental health system of the State of Alabama. The corporation has continued, without change, the services of the Eastside Mental Health Center, which had been originally established in 1974 as an unincorporated service unit owned and operated wholly by the Jefferson-Blount-St. Clair [Counties] Mental Health/Mental Retardation Authority ("Jefferson Authority"). The Jefferson Authority is a regional agency established by the State of Alabama in 1969 to provide and to coordinate comprehensive, community-based mental health services within three counties, as part of an overall restructuring and decentralization of such services by the State, pursuant to 1967 legislation formerly known as "Act 310," Ala. Code §§ 22-51-1 to -14 (1975) (Appendix, 39a-49a). 669 F.2d at 673-74; Appendix, 5a-7a.

Solely to avoid allegations of purported "conflict of interest" in the disbursement of State funds within its region, the Jefferson Authority incorporated Eastside in 1975 as a separate, nonprofit corporation. 669 F.2d at 674; Appendix, 6a. Because the State limited the number of Act 310 corporations that could exist and receive funds thereunder within the Jefferson Authority's region, Eastside was incorporated under Alabama's general nonprofit corporation statute, Ala. Code § 10-3-1 (1975), rather than under Act 310. 669 F.2d at 673-74; Appendix, 6a. However, the Jefferson Authority, and the State of

Alabama, retain comprehensive, detailed and final control over Eastside's structure, operations, programs, employees, services, budget and funding. *See* Ala. Dept. of Mental Health, *Standards For Community Mental Health Centers*, Appendix, 51a-55a. Eastside's employment policies and practices continue to be tightly controlled by the State, and Eastside is a member of, and its employees are covered by, the State retirement and pension system. 509 F. Supp. at 581, 583-84; Appendix, 27a-28a, 35a.

Eastside provides inpatient and outpatient care, emergency care, consultation and educational services, and specialized services for children, adults, the elderly and persons with alcohol or drug-related problems. It also runs a Transitional Home Program for persons entering or leaving state hospitals, and it assists the local probate court in screening persons for state institutions. 669 F.2d at 675; Appendix, 8a.

In February 1977, and May 1979, Eastside received copies of letters from the federal Wage-Hour Area Director stating that employees of Alabama's community mental health centers, including "transitional home managers" such as respondent Williams, were providing traditional state services and thus were *not* subject to the requirements of the Fair Labor Standards Act ("FLSA"), 29 U.S.C. §§ 201-219 (1976). *See* Appendix, 56a, 57a. Relying on those letters, Eastside and the State's 24 other centers established work schedules and paid their employees, including respondent Williams, assuming that the centers were immune from application of the detailed FLSA wage-hour regulations enforced by the federal Wage-Hour Division.

Respondent Williams was hired by Eastside effective February 1, 1977, and worked in Eastside's Transitional

Home Program as a live-in home manager, overseeing residents' training in basic socialization skills and routine activities. 669 F.2d at 672-73; Appendix, 4a. Williams resigned his position at Eastside on May 8, 1979, and promptly thereafter brought suit against Eastside in the United States District Court for the Northern District of Alabama, seeking an award of back pay. Jurisdiction lay in that court under 29 U.S.C. § 216(b) (Supp. IV 1980) and 28 U.S.C. § 1331 (Supp. IV 1980). The basis of Williams' claim was that Eastside is subject to FLSA requirements as a private "enterprise" covered by FLSA Section 203(s)(5), 29 U.S.C. § 203(s)(5), and that Eastside had violated the FLSA's minimum wage and overtime provisions, 29 U.S.C. §§ 206 and 207. 509 F. Supp. at 580; Appendix, 33a.

Following initial discovery, Williams moved for partial summary judgment on liability. 509 F. Supp. at 580-81; Appendix, 23a-24a, 33a. Eastside cross-moved for summary judgment, asserting essentially that it is not a covered private "enterprise," but rather a public entity constitutionally immune from FLSA regulation under *National League of Cities* v. *Usery*, 426 U.S. 833 (1976). 509 F. Supp. at 580-81, 582-83; Appendix, 24a, 33a.

On April 10, 1980, the District Court denied Williams' motion for partial summary judgment and granted Eastside's cross-motion, ruling (1) that Eastside is a "public" corporation rather than a private "enterprise"; (2) that Eastside performs an integral, traditional governmental function by providing community mental health services within a comprehensive state system;[2] and (3) that East-

[2] The District Court relied upon the four-part test for "integral" governmental services set forth in *Amersbach* v. *City of Cleveland*, 598 F.2d 1033 (6th Cir. 1979), where the Sixth Circuit held that municipal airport employees were not covered by FLSA under *National League of Cities*. *See infra*, p. 20.

side is therefore exempt from FLSA compliance under *National League of Cities*. 509 F. Supp. at 581; Appendix, 35a-36a.

Williams thereupon moved the District Court for reconsideration, arguing in part that Eastside is not a "political subdivision" under a two-part test utilized in decisions delineating National Labor Relations Board ("NLRB") jurisdiction, including *NLRB* v. *Highview, Inc.*, 590 F.2d 174 (5th Cir.), *vacated in part on other grounds*, 595 F.2d 339 (5th Cir. 1979) (per curiam). 509 F. Supp. at 582; Appendix, 25a-26a. The United States Department of Labor filed a brief *amicus curiae* in the District Court supporting reconsideration. The District Court reopened the case and permitted additional discovery regarding Eastside's nature and functions. 509 F. Supp. at 581; Appendix, 23a.

On March 24, 1981, the District Court denied reconsideration and reaffirmed its prior judgment, holding (1) that, utilizing the four-part *Amersbach* test, Eastside provides an "integral" government service; and (2) that Eastside is thus exempt from FLSA compliance, under *National League of Cities*. While stressing that utilization of the *Highview* "political subdivision" test was, in its view, neither appropriate nor necessary, the District Court held, alternatively, that Eastside also meets that test, since, under part two of the test, Eastside's administrative board members are responsible to public officials. 509 F. Supp. at 583-84; Appendix, 28a.

On appeal,[3] the Eleventh Circuit reversed. The court stated that *Hodel* v. *Virginia Surface Mining &*

[3] In the Court of Appeals, the State of Alabama briefed and argued as *amicus curiae* for Eastside; the United States Department of Labor briefed and argued as *amicus curiae* for Williams.

Reclamation Association, Inc., 452 U.S. 264 (1981), had interpreted *National League of Cities* "as requiring that, *inter alia*, the federal regulation in question must address the 'States as States' in order that there be an infringement of state sovereignty"; and thus that *National League of Cities* assertedly involves "only the payment of wages by *state or subordinate political bodies*." 669 F.2d at 677; Appendix, 12a-13a (emphasis in original). To apply these principles, the court below considered that "the relevant inquiry is the extent of control the states maintain over the activities and administration of the entity in question." 669 F.2d at 677: Appendix, 13a. The court then concluded that Eastside could avoid FLSA compliance only if it were a "political subdivision."

To determine whether Eastside is a "political subdivision," the Court of Appeals used the two-part NLRB jurisdiction test[4] employed in decisions such as *Highview*, *supra*, noting:

> Although these [NLRB] cases turn on the construction of the Labor Relations Act and not on constitutional considerations of state sovereignty, we find them helpful in our inquiry, and *until the* [Supreme] *Court holds otherwise* we will adopt this approach.

669 F.2d at 677; Appendix, 13a (emphasis added). While acknowledging the "borderline nature of the facts," 669 F.2d at 678; Appendix, 15a, the court, focusing primarily on the NLRB test's second part, concluded that Eastside is not a "political subdivision" since its administrative board members are not, in the court's view, sufficiently

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[4] The court based its "analogy to the labor cases on the simple fact that the precise term 'political subdivision' is used in both the *Usery* case and the NLRB cases." 669 F.2d at 677, n.8; Appendix, 13a, n.8.

responsible to state officials or voters, even though public agencies appoint a majority of them, and "the Jefferson Authority must ratify the appointment of all board members, including those appointed by private organizations." 669 F.2d at 674; Appendix, 7a. *See* 669 F.2d at 679; Appendix, 17a.[5]

In addition, the court below stated that, even if Eastside were a "political subdivision," it performs no "integral" state function, and thus is not protected by *National League of Cities*. Defining "integral function" as "one that a state performs for or in relation to the society at large, the state as a whole," 669 F.2d at 680; Appendix, 19a, the court concluded that "Eastside's function of providing mental health services to the citizens of Alabama is not an integral [state] function. . . ." 669 F.2d at 680-81; Appendix, 20a.[6]

REASONS FOR GRANTING THE WRIT

I. THE DECISION BELOW FAILS TO FOLLOW THE DECISIONS OF THIS COURT.

In *National League of Cities* v. *Usery*, 426 U.S. 833 (1976), this Court considered and resolved the conflict

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[5] Essentially, the court dismissed the State's pervasive control over Eastside's structure, operations and employees as simply "stringent licensing standards." 669 F.2d at 679; Appendix, 17a.

[6] Eastside sought rehearing and rehearing *en banc*. Considering its entire mental health system jeopardized by the Court of Appeals' statement that provision of mental health services does not constitute an "integral" state function, *see infra* p. 17, the State of Alabama sought intervention, rehearing, and rehearing *en banc*. Intervention was denied and, on May 13, 1982, rehearing and rehearing *en banc* were denied. Appendix, 1a-2a. The Eleventh Circuit stayed its Mandate until August 5, 1982, pending the filing of this petition for writ of certiorari.

between the interests of state sovereignty embodied in the Tenth Amendment and Congress' plenary power under the Commerce Clause to regulate state activities, in the particular context of the application to state employees of the very FLSA[7] minimum wage and maximum hour provisions involved herein. In overruling *Maryland* v. *Wirtz*, 392 U.S. 183 (1968), which had upheld the constitutionality of those FLSA provisions as applied to state school and hospital employees, and in declaring the provisions unconstitutional as applied to state police and fire employees, this Court held in *National League of Cities* that:

> the dispositive factor is that Congress has attempted to exercise its Commerce Clause authority to prescribe minimum wages and maximum hours to be paid by the States in their capacities as sovereign governments. In doing so, Congress has sought to wield its power in a fashion that would impair the States' "ability to function effectively in a federal system." This exercise of congressional authority does not comport with the federal system of government embodied in the Constitution. *We hold that insofar as the challenged amendments operate to directly displace the States' freedom to structure integral operations in areas of traditional governmental functions, they are not within the authority granted Congress by Art. I, § 8, cl. 3.*

426 U.S. at 852 (emphasis added; citation and footnote omitted).

In two more recent decisions, this Court has articulated a flexible three-part test for determining whether the Tenth Amendment precludes application to the

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[7] 29 U.S.C. §§ 201-219 (1976).

States of federal Commerce Clause legislation under the *National League of Cities* rationale:

> [I]n order to succeed, a claim that congressional commerce power legislation is invalid under the reasoning of *National League of Cities* must satisfy *each* of three requirements. *First*, there must be a showing that the challenged regulation regulates the "States as States." *Second*, the federal regulation must address matters that are indisputably "attributes of state sovereignty." And *third*, it must be apparent that the States' compliance with the federal law would directly impair their ability "to structure integral operations in areas of traditional functions."

United Transportation Union v. *Long Island Railroad Co.*, ___ U.S. ___, 102 S. Ct. 1349, 1353 (1982) (emphasis added; citations and footnotes omitted) (*quoting Hodel* v. *Virginia Surface Mining & Reclamation Association, Inc.*, 452 U.S. 264, 287-288 (1981)).

The Court of Appeals misconstrued and misapplied this tripartite test's first requirement in reaching its conclusion that application of the FLSA to Eastside would not affect the State of Alabama *qua* State. And in concluding that the provision of comprehensive mental health services to all citizens of Alabama is not an integral state operation, the court also misconstrued and misapplied the test's third requirement. These failures of the court to follow *National League of Cities* and its progeny warrant full review and reversal by this Court.

A. In Reaching Its Conclusion That FLSA Regulation Of Eastside Would Not Constitute Regulation Of The "State As State," The Court Of Appeals Failed To Follow The Decisions Of This Court.

As the District Court in this case properly concluded, under the *National League of Cities* "State as State" inquiry:

> the main issue is whether the defendant provides a traditional government service, *not merely* whether or not it is a political subdivision or public corporation.

509 F. Supp. at 583; Appendix, 27a (emphasis added). That is, a court adjudicating a constitutional challenge to federal regulation under *National League of Cities* should not treat the first part of the three-part test as an isolated threshold determination. Rather, it should go beyond the form and examine the *function* of the entity seeking FLSA immunity. While the form of the entity is relevant, it should rarely be dispositive of the constitutional issue.

The Court of Appeals, however, incorrectly interposed and utilized an unduly narrow and formalistic "political subdivision" subtest to reach its conclusion that FLSA regulation of Eastside would not constitute regulation of the "State as State" within the first part of the *National League of Cities* tripartite test. 669 F.2d at 678; Appendix, 15a.

The vice of engrafting an additional, formalistic, threshold requirement onto the *National League of Cities* inquiry is clear: the principal focus then becomes the mere superficial *form* of the entity being regulated, not whether federal regulation directly impairs a state's ability "to structure integral operations in areas of traditional functions." *Hodel*, 452 U.S. at 287-88. Such an

approach can generate wholly arbitrary and unwarranted results, as it did in this case where the mere fortuity of Eastside's incorporation under Alabama's general non-profit incorporation statute (because the per-county quota of "Act 310 corporations" was full) assertedly removed Eastside from the threshold "political subdivision" category, in the Eleventh Circuit's view. Yet that "private" corporate form is the only arguably "non-public" aspect of Eastside's nature and functions, which are in all other salient respects indistinguishable from those of the "public corporations" providing the same mental health services to Alabama's citizens.

Neither this Court nor any other court has interposed such a threshold, arbitrary "political subdivision" inquiry in Tenth Amendment determinations. Indeed, such an approach conflicts directly with this Court's more reasoned, in-depth approach utilized in *Hodel*. In that case, the entities seeking constitutional immunity were unquestionably *private* coal mine operators, yet no threshold "political subdivision" inquiry prevented the Court from going further into a careful analysis of the impact of federal surface mining regulation on the State's sovereignty. By contrast, under the Eleventh Circuit's view, this Court in *Hodel* would never have gone beyond the simple, formalistic determination that the private coal mine operators were not "political subdivisions," and thus the basic issue of federalism involved therein would never have been reached.

Tenth Amendment inquiries are not, and should not be, simple and formalistic, as this Court has recognized. Yet the Eleventh Circuit has reduced the inquiry here to just such a level—an error compounded by its selection and use of the two-part NLRB subtest.

In attempting to explain its choice of this subtest, the Court stated:

> [W]e think the relevant inquiry is the extent of control the states maintain over the activities and administration of the entity in question. Indeed it seems to us appropriate to borrow from principles established by the court in NLRB cases involving the issue of whether a particular entity is a political subdivision and is therefore exempt from the provisions of the National Labor Relations Act, 29 U.S.C.A. § 152(2) (1973). *See NLRB* v. *Natural Gas Utility Dist.*, 402 U.S. 600, 91 S. Ct. 1746, 29 L.Ed.2d 206 (1971). In *NLRB* v. *Natural Gas*, the Court in a close case considered relevant whether the entity seeking exemption was administered by individuals responsible to public officials or to the general electorate. *Although these cases turn on the construction of the Labor Relations Act and not on constitutional considerations of state sovereignty, we find them helpful in our inquiry, and until the Court holds otherwise we will adopt this approach.*

669 F.2d at 677; Appendix, 13a (emphasis added; citation and footnote omitted). Thus the court, in resolving a fundamental challenge to the constitutionality of the FLSA, selected and applied a statutory construction subtest, which had been previously used only to determine an unrelated federal agency's jurisdiction under a totally different statute (the NLRA).

As this Court stated in *NLRB* v. *Natural Gas Utility District*, 402 U.S. 600 (1971), relied upon by the court below:

> The term "political subdivision" is not defined in the [National Labor Relations] Act and the Act's legislative history does not disclose that Congress explicit-

> ly considered its meaning. The legislative history does reveal, however, that Congress enacted the § 2(2) exemption to except from Board cognizance the labor relations of federal, state, and municipal governments, *since governmental employees did not usually enjoy the right to strike.*

402 U.S. at 604 (emphasis added; footnote omitted). This distinction regarding the right to strike obviously provides no rationale for use of the NLRB subtest in Tenth Amendment determinations, where fundamental issues of intergovernmental immunity—not the NLRB's lack of jurisdiction over certain employers—are involved.

The Eleventh Circuit's stated rationale for selecting the NLRB subtest was as follows:

> We base our analogy to the labor cases on the simple fact that the precise term "political subdivision" is used in both the *Usery* case and the NLRB cases.

669 F.2d at 677, n.8; Appendix, 13a, n.8. But the mere appearance of the words "political subdivision" in both *National League of Cities* and unrelated NLRB cases provides no reasoned rationale for selection of the NLRB subtest. In short, the Eleventh Circuit provided no rationale for its use of this subtest.

In any event, even if the NLRB subtest had any validity in this context, the Eleventh Circuit failed to properly apply either of the alternative parts of that subtest to Eastside. Under *NLRB* v. *Natural Gas Utility District*, a "political subdivision" is an entity " '*either* (1) created directly by the state, so as to constitute departments or administrative arms of the government, *or* (2) administered by individuals who are responsible to public officials or to the general electorate.' " 402 U.S. at 604-05 (emphasis added) (*quoting* NLRB's brief).

The opinion of the court below simply sidesteps the first alternative part of this subtest. The record is clear that Eastside was created *by the Jefferson Authority*, unquestionably an administrative arm of the State of Alabama, solely to provide mental health services on behalf of the State. 669 F.2d at 673-74; Appendix, 6a. Having been created by an Alabama agency for this purpose, Eastside was in substance created by the State of Alabama itself. Indeed, the court below conceded this fact,[8] yet ultimately concluded that Eastside fails the NLRB subtest. Had the first alternative part of that subtest been properly applied, the conclusion would undoubtedly have followed that Eastside was "created directly by the State" and is an administrative arm thereof. *Natural Gas*, 402 U.S. at 604.

As to the second alternative part of the NLRB subtest, the Court of Appeals reversed the District Court's holding that:

> The extent of state control and accountability of defendant's [Eastside's] administrators to state agencies and public officials renders it a political subdivision under part two of the *Highview* [*i.e.*, *Natural Gas*] test.

509 F. Supp. at 584; Appendix, 28a-29a. In so doing, the Court of Appeals adopted the extraordinarily restrictive view that, because the State "has no power whatsoever to *dismiss* any of the board appointments," 669 F.2d at 679; Appendix, 17a (emphasis added), Eastside's administra-

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[8] "For whatever reason, Alabama did not elect to operate Eastside as a state institution with state employees; instead *it set up* a not for profit corporation with a separate, independent board of directors to administer it." 669 F.2d at 678; Appendix 15a (emphasis added).

tive board is assertedly not "directly responsible to a public official or to the general electorate." *Id.*

However, the court apparently dismissed or disregarded the facts that (1) a majority of Eastside's board members are appointed by State agencies (with the remaining minority appointed by nonprofit, public-interest entities), 669 F.2d at 674, n.4; Appendix, 7a, n.4; that (2) "the Jefferson Authority must *ratify* the appointment of *all* board members, including those appointed by private organizations," 669 F.2d at 674; Appendix, 7a (emphasis added); and that (3) Eastside's board members are, as the District Court correctly concluded, completely "responsible" to Alabama public officials through close regulation, control, audits, and budget oversight by the Jefferson Authority, applying Alabama's comprehensive *Standards For Community Mental Health Centers*, Appendix, 51a-55a. Given this pervasive regulation and control by the State, the Court of Appeals' particularized reliance upon the Jefferson Authority's mere inability to *remove* board members it originally ratified cannot justify the court's conclusion that Eastside's board was not "responsible to a public official." 669 F.2d at 679; Appendix, 17a.

Finally, the court also overlooked the "supplier" exception to the NLRB subtest articulated in *NLRB* v. *Highview, Inc.*, 590 F.2d 174 (5th Cir.), *vacated in part on other grounds*, 595 F.2d 339 (5th Cir. 1979) (per curiam), decided prior to the division of the Fifth and Eleventh Circuits. There, considering a nonprofit nursing home's assertion of NLRA immunity, the Fifth Circuit noted that:

> the Board [NLRB] will decline to assert jurisdiction over an employer if it *supplies an exempt institution*

> *with services that are an essential attribute of the purpose of the exempt institution.*

590 F.2d at 178 (emphasis added). Properly applying this "supplier" exception to the NLRB subtest, Eastside could only be deemed immune from FLSA coverage because it supplies mental health services for the Jefferson Authority and to the State of Alabama and its citizens.

B. The Conclusion Of The Court Of Appeals That Provision Of Mental Health Services Does Not Constitute An Integral State Operation Conflicts With Decisions Of This Court.

The Court of Appeals concluded that, "even if the State of Alabama had chosen to operate Eastside as a state agency, the Center is not performing an 'integral' function and thus the *Usery* exemption would not apply." 669 F.2d at 680; Appendix, 18a. This conclusion, that provision of mental health services is not within the scope of "public health" activities immune from FLSA regulation, conflicts directly with *National League of Cities*.

In overruling *Maryland* v. *Wirtz*, 392 U.S. 183 (1968), which had upheld the constitutionality of extension of FLSA coverage to employees of state schools, hospitals and similar facilities, *National League of Cities* stated unequivocally that:

> *public health* . . . [is an activity] typical of those performed by state and local governments in discharging their dual functions of administering the public law and furnishing public services.

426 U.S. at 851 (emphasis added; footnote omitted). Therefore, this Court concluded that FLSA regulation of state "public health" activities would be presumptively unconstitutional, where it would "significantly alter or displace the States' abilities to structure employer-employee relationships in such areas." 426 U.S. at 851.

Until recently, the Labor Department has not contended that provision of mental health services falls outside "public health" activities immunized from FLSA coverage by *National League of Cities*. *See* 29 C.F.R. § 775.3(b) (1980). Indeed, the Government indicated consistently that "public health" includes "mental health." *See* Opinion Letter of Wage-Hour Administrator, No. 1545 (WH-492), Feb. 1, 1979 (county hospital for mentally retarded serves traditional governmental function); letters of James A. Tucker, Area Director, Wage-Hour Division, February 23, 1977, and May 22, 1979, Appendix, 56a, 57a (Alabama community mental health centers immune from FLSA regulation under *National League of Cities*).

Thus, the Eleventh Circuit's unprecedented conclusion that "mental health" is excluded from "public health" for Tenth Amendment purposes—and the resulting virtual resurrection of *Maryland* v. *Wirtz*—conflicts directly with *National League of Cities*.

Even if some reasoned distinction between "mental health" and "public health" could be suggested in the abstract, the Eleventh Circuit has created, out of whole cloth, a novel and inappropriate subtest—which can only be described as a "100% impact" subtest—to resolve the "integral operation" issue in this context. For the court, a state operation is not "integral" unless it "relate[s] to the *entire state populace*" or "produce[s] significant consequences affecting *all persons* in the state." 669 F.2d at 680; Appendix, 19a (emphasis added).

But there is nothing in *National League of Cities* supporting imposition of such a novel subtest. Moreover, it does not, in fact, justify any distinction between "public health" services and "mental health" services. Even if "public health" could be interpreted as being limited to

"*physical* health"—an interpretation without support in *National League of Cities* or elsewhere—obviously *both* physical *and* mental health services can benefit a state's entire citizenry, and the effects of both "reverberate throughout the society as a whole." 669 F.2d at 680; Appendix, 19a. Certainly all persons do not demand or receive either physical or mental health services at any given moment, but all persons could potentially benefit from both. Moreover, no modern society could function without either. Thus, even applying a "100% impact" subtest, the result reached by the court is unjustified and unsupportable.

In sum, the ruling below that mental health services do not fall within the scope of "public health" activities immune from FLSA regulation directly conflicts with *National League of Cities* and thus warrants review and reversal by this Court.

II. THE DECISION BELOW CONFLICTS WITH RECENT DECISIONS OF THE UNITED STATES COURTS OF APPEALS FOR THE FIRST, FIFTH AND SIXTH CIRCUITS.

The Eleventh Circuit's unprecedented creation and application of its "100% impact" subtest for determining an "integral state operation" further conflicts directly with several recent Courts of Appeals decisions, including that of the United States Court of Appeals for the Sixth Circuit in *Amersbach* v. *City of Cleveland*, 598 F.2d 1033 (6th Cir. 1979). There, the court utilized a flexible four-part subtest to conclude that municipal airport employees were performing "integral" and "traditional" state functions, and thus were immune from FLSA

regulation under *National League of Cities*. The Sixth Circuit stated:

> By analyzing the services and activities which the [Supreme] Court characterized [in *National League of Cities*] as typical of those performed by governments, we note certain elements common to each which serve to clarify and define a method by which a protected government function may be identified. Among these elements are: (1) the government service or activity benefits the community as a whole and is available to the public at little or no direct expense; (2) the service or activity is undertaken for the purpose of public service rather than for pecuniary gain; (3) government is the principal provider of the service or activity; and (4) government is particularly suited to provide the service or perform the activity because of a communitywide need for the service or activity.

598 F.2d at 1037. This well-reasoned four-part "integral function" subtest, employed by the District Court herein, 509 F. Supp. at 580-81, 583; Appendix, 26a-28a, 34a-35a, was approved and utilized recently by the United States Court of Appeals for the First Circuit in *Molina-Estrada* v. *Puerto Rico Highway Authority*, No. 81-1447, slip op. at 8-9 (1st Cir. June 8, 1982). However, this approach was either completely ignored or rejected *sub silentio* by the Eleventh Circuit. Indeed, neither *Amersbach* nor its thoughtful four-part subtest is mentioned in the opinion below.[9]

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[9] Alternatively, the court might have adopted (but did not adopt) the "historical" approach utilized recently in *Kramer* v. *New Castle Area Transit Authority*, 677 F.2d 308 (3d Cir. 1982), which followed this Court's somewhat similar approach in *Long Island Railroad*, ___ U.S. ___, 102 S.Ct. 1349 (1982).

The decision below also conflicts with the Fifth Circuit's ruling in *NLRB* v. *Highview, Inc.*, *supra* (relied upon heavily by respondent and the Labor Department below for adoption of the two-part NLRB "political subdivision" subtest). There, on the "integral state operation" issue, the Fifth Circuit, citing *National League of Cities*, stated:

> We wholeheartedly agree with Highview that the care of the aged, the sick, and the indigent is a traditional function of government . . . . Certainly, no one moderately aware of our history, our traditions, and our ideals can argue that this care is not a 'traditional' function of government.

590 F.2d at 178. The Fifth Circuit thus concluded that a nonprofit nursing home—similar to a community-based residential mental health center such as Eastside—was providing an "essential" and "traditional" governmental function. *Id.* But as with *Amersbach*, the court below failed to mention *Highview* in its opinion, even on the "political subdivision" issue.

The court's improper creation and application of the "100% impact" subtest to determine an "integral state operation" thus conflicts with the recent decisions of three other Courts of Appeals, and therefore warrants review and reversal by this Court.

III. REVIEW AND REVERSAL BY THIS COURT IS NECESSARY TO PRESERVE STATE SOVEREIGNTY AND VIABILITY IN THE PROVISION OF PUBLIC MENTAL HEALTH SERVICES.

A. The Issue Is Substantial.

The Tenth Amendment protects state sovereignty from abrogation by Congress' exercise of its Commerce

power. In *National League of Cities* this Court stressed the importance of this protection:

> We have repeatedly recognized that there are attributes of sovereignty attaching to every state government which may not be impaired by Congress, not because Congress may lack an affirmative grant of legislative authority to reach the matter, but because the Constitution prohibits it from exercising the authority in that manner.

426 U.S. at 845. This Court's continuing interest in resolving the conflict between the Tenth Amendment and the Commerce power—and thus in delineating the scope of *National League of Cities*—has been indicated recently in *Hodel* and *Long Island Railroad*. These recent decisions indicate an evolutionary approach to interpreting *National League of Cities*. By contrast, the ruling below could have the deleterious effect of arresting, if not reversing, that evolution and "virtually restrict[ing] the rule of *National League of Cities* to the particular and peculiar facts of that case." *Kramer* v. *New Castle Area Transit Auth.*, 677 F.2d 308, 311 (3d Cir. 1982) (Garth, J., concurring) (citation omitted).

Continuing resolution of this intraconstitutional conflict, and further delineation of *National League of Cities*' scope, would be particularly appropriate here, in light of this Court's particular sensitivity to the States' preeminence and presumed autonomy regarding mental health treatment. *See, e.g., Youngberg* v. *Romeo*, 50 U.S.L.W. 4681 (U.S. June 18, 1982); *Mills* v. *Rogers*, 50 U.S.L.W. 4677 (U.S. June 18, 1982); *Pennhurst State School & Hospital* v. *Halderman*, 451 U.S. 1 (1981); *Schweiker* v. *Wilson*, 450 U.S. 221 (1981).

Guidance from this Court now regarding the proper tests and subtests to be applied under *National League of*

Cities would be especially timely in view of the many cases pending in the lower courts in which similar Tenth Amendment issues have been raised.[10]

B. The Decision Below Could Seriously Jeopardize State Mental Health Systems.

In the District Court the parties assumed and never questioned that provision of mental health services constitutes an integral state operation. Thus, the Eleventh Circuit's contrary ruling below on that issue was as unanticipated as it is unprecedented and unsound. Because that ruling directly jeopardized Alabama's entire mental health system, the State immediately sought to intervene in the Court of Appeals as a party, and to obtain a rehearing *en banc*. The State argued in its March 22, 1982 Motion To Intervene that "the opinion issued by the Court of Appeals in this case has acted to deal a serious blow to the ability of the [State] Department [of Mental Health] to discharge [its] responsibility" to provide mental health services to Alabama citizens. State of Alabama Motion to Intervene at 7. However, the Eleventh Circuit denied both intervention and rehearing.

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[10] *See, e.g., San Antonio Metropolitan Area Transit Auth.* v. *Donovan*, Civ. No. 5A-79-CA-457 (W.D. Tex. Nov. 17, 1981), *vacated and remanded*, No. 81-1728, ___ U.S. ___, 50 U.S.L.W. 3960 (June 8, 1982); *Alewine* v. *City Council of Augusta, Ga.*, 505 F. Supp. 880 (S.D. Ga. 1981), *appeal pending*, No. 81-790 (11th Cir.); *Dove* v. *Chattanooga Area Regional Transp. Auth.*, 539 F. Supp. 36 (E.D. Tenn. 1981), *appeal pending*, No. 81-5636 (6th Cir.); *Joiner* v. *City of Macon*, C.A. No. 79-287-MAC (M.D. Ga. April 27, 1981), *appeal pending*, No. 81-7780 (11th Cir.)

The court below has itself indicated the extent of this "serious blow":

> Assuming the facts as alleged by the plaintiff [respondent Williams], the salary [he] received during his entire employment at Eastside was about $27,000 short of the minimum required under the FLSA.

669 F.2d at 673; Appendix, 4a. Thus, even if the court below had limited its ruling to Eastside—thereby restricting it to the three non-Act-310 corporations among the 25 mental health centers comprising the Alabama system—the State would bear a substantial economic burden.[11] This unanticipated financial burden could become staggering due to the ruling below that *none* of the State's 25 mental health centers is immune from FLSA regulation, because none assertedly performs an "integral" state "public health" operation.

In addition to this potentially enormous unbudgeted and unfunded back-pay liability, the State would face several equally unpalatable choices—among them increasing taxes, seeking increased federal assistance (which is, however, steadily declining), or sacrificing other social service programs—in order to maintain present mental health services in its centers. Otherwise, the

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[11] Each center has two home managers. If the amount allegedly owed Williams is representative, and if all managers worked two years (like Williams), back wages due from three centers would total *$162,000*. That amount could be doubled under the FLSA's liquidated damages provision, 29 U.S.C. § 216(b). The State has calculated that its total potential (unliquidated) liability for mental health employees in *all* 25 centers would exceed $700,000.

quality and quantity of such services would inevitably decrease.[12]

Having considered a similar potentially ruinous financial burden upon state fire and police agencies, this Court stated in *National League of Cities*:

> Quite apart from the substantial costs imposed upon the States and their political subdivisions, the [FLSA] displaces state policies regarding the manner in which they will structure delivery of those governmental services which their citizens require . . . . [I]t cannot be gainsaid that the federal requirement directly supplants the considered policy choices of the States' elected officials and administrators as to how they wish to structure pay scales in state employment.

426 U.S. at 847-48. The decision below similarly abrogates a specific attribute of Alabama's sovereignty: the right to choose the levels of quality and quantity of state mental health care, the manner of delivering such care to

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[12] Equally ruinous consequences could ensue in other states with similar decentralized mental health systems. This Court has already addressed one such situation, although, for procedural reasons, the Court did not reach the merits. In *Richland County Association for Retarded Citizens* v. *Marshall*, 86 Lab. Cas. (CCH) ¶ 33, 799 (D. Mont. April 10, 1978), the District Court immunized an admittedly "private" mental health center from FLSA regulation. The Ninth Circuit initially affirmed. After the Secretary of Labor noted an appeal to this Court and filed a jurisdictional statement, the Ninth Circuit withdrew its affirmance and issued a new opinion reversing the District Court. 660 F.2d 388 (9th Cir. 1981). This Court subsequently held that the Court of Appeals lacked jurisdiction of the case. The judgment and opinion of the Court of Appeals were vacated accordingly. ___ U.S. ___, 102 S.Ct. 713 (1982) (per curiam) *(sub nom. Donovan* v. *Richland County)*. The District Court's ruling was thus left intact.

Alabama citizens, and the wage and hour policies applicable to employees providing such care—all free from an overwhelming, federally-imposed economic burden.

CONCLUSION

For these reasons, this petition for writ of certiorari should be granted.

Respectfully submitted,

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